No. 84-90

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH F. HARGRAVE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner's rights were violated when the police surreptitiously eavesdropped on a telephone conversation which Hargrave was permitted to make upon arrest, and which petitioner thought was confidential and private?

(A) Whether the fruits of that conversation, which involved an incriminatory statement allegedly made by petitioner, should have been suppressed in view of the fact that the police surreptitiously eavesdropped on this sole conversation which Hargrave was permitted to make after his arrest?

2. Whether petitioner was denied a fair trial and a proper right of confrontation when an important government witness, Yaghi, suddenly absconded prior to the completion of his full cross-examination and prior to the opportunity by defense counsel to question him concerning certain matters supplied to them by the government very late in the trial?

3. Whether the government was properly permitted to use the testimony of a cooperating government witness who held a conversation with Hargrave while both were in the Metropolitan Correctional Center, at a point in time when Hargrave had already retained counsel and was unaware of the fact that this witness, Nassif Berro, was cooperating with the government? 4. Whether the Trial Court and the Court of Appeals erred in holding that it was proper to introduce into evidence against petitioner marijuana and hashish retrieved from a co-defendant's (Mourad) home during the investigation, when the sole charges in the indictment related to heroin?

(A) Whether the Court erred in refusing a charge that the hashish and marijuana be considered only as against Mourad?

5. Whether petitioner was prejudiced by the introduction into evidence of a gun found under co-defendant Yacteen's bed upon his arrest, without limiting the introduction of that gun to Yacteen alone?

6. Whether petitioner was denied a fair trial by a continuous series of discovery violations on the part of the government, therefore rendering the trial a trial by "ambush"?

7. Whether the government has a right to overhear or eavesdrop upon a telephone conversation between the defendant and any other party, when that telephone conversation is pursuant to an offer made to the defendant upon arrest, that he had a right to make one telephone call?

8. Whether the sentence imposed upon Hargrave, a first offender, of 45 years imprisonment and $120,000.00 fine, constitutes cruel and unusual punishment, under the Eighth Amendment of the United States Constitution?

THE PARTIES

In the Trial Court there were a number of co-defendants placed on trial together. These included Tamer Trad Mourad; Jamil Hameiah; Ghassan Saleh; Mawalaraji Yacteen; Adnan Yacteen; and Nemr Hazime. Only Joseph Hargrave is petitioning this Court for certiorari in this petition, but we understand that co-defendant Tamer Trad Mourad has also petitioned this Court for certiorari, and we join in that petition as well.

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OPINION BELOW

The opinion of the United States Court of Appeals is annexed as an exhibit to this petition.

JURISDICTION

(A) The judgment of the United States District Court for the Southern District Court, convicting petitioner Hargrave, as well as co-defendants Mourad and Yacteen, was rendered the 18th day of May 1983, after trial before United States District Judge Thomas P. Griesa, and a jury, following an eight-week trial. The defendants, including petitioner, were convicted of conspiring to import heroin, 21 U.S.C. §963 (1982), and conspiring to distribute heroin, 21 U.S.C. §846 (1982). In addition, all of the defendants were convicted of various substantive violations of the narcotics laws, for importing and distributing heroin (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 952, 960 (1982); and to facilitate the distribution of heroin, (18 U.S.C. §1952); and of using interstate facilities to promote the distribution of heroin, (18 U.S.C. §1952 (1982).

The petitioner herein maintained that he did not receive a fair trial because of certain errors involving discovery; using a statement which petitioner made during a telephone conversation he was permitted to make following his arrest, which was eavesdropped upon by federal agents; his inability to cross-examine fully certain witnesses; the use of a jailmate who had conversations with Hargrave while both were in prison, and who was secretly cooperating with the government at the time.

(B) The petitioner applied for a rehearing of the determination of the Second Circuit, which rehearing was denied by that Court on the 18th day of April, 1984.

By order of Honorable Thurgood Marshall, dated the 18th day of June, 1984, petitioner was given permission to file his petition for certiorari up to and including the 17th day of July, 1984.

(C) The jurisdiction to review the judgment and order in question by certiorari is conferred under 28 U.S.C. §1254 and §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved herein.

STATEMENT OF THE CASE

At the outset it is important to note that at no time was Hargrave ever found in possession of any drugs. No searches and seizures were executed against Hargrave, and no incriminatory physical evidence was obtained from him. Nor were any tape recordings introduced bearing his voice.

After an eight-week trial, however, which featured the testimony of four accomplice witnesses, among others, evidence of physical surveillances, evidence of the fruit of various searches, and proof of unexplained wealth, the jury convicted.

The Court of Appeals determined that the jury could have found that appellants were high-ranking figures in an international narcotics smuggling operation that transported a continuous flow of large quantities of heroin from Lebanon to the United States over a four-year period. Supposedly this smuggling operation began in 1979 when co-defendant Mourad and Hargrave

allegedly travelled to Lebanon to meet with a heroin refiner. The Court of Appeals found that Mohamed Berro was introduced to Mourad and Hargrave on the trip to Lebanon and that Berro was a Lebanese Customs official. The three of them supposedly agreed that a dummy corporation would be set up involving Berro, Mourad and Hargrave, with offices in New York and Beirut, so as to cover frequent travelling which would be necessary.

Nassif Berro, the son of this former Customs official, was one of the prosecution's chief witnesses at trial, and he testified to a conversation he had while both he and Hargrave were in jail. Hargrave had already been arrested and it was known at that time that he had retained counsel. Nassif Berro testified that Hargrave had offered to assist him in his defense, although he never actually did, and revealed conversations indicating that he was aware of the narcotics conspiracy. Certain items such as hashish and marijuana, seized from defendant Mourad's home, were introduced against all the defendants on trial, including Hargrave.

In addition, a gun found under Yacteen's bed was introduced as against all the defendants, including Hargrave.

Despite requests, *no limiting instructions were given to the jury*, that this evidence should be adduced and considered only as against the particular defendant involved.

During the trial, the production of material required by 18 U.S.C. §3500 (1982) [The Jencks Act], Fed.R.Crim.P. 16, and *Brady v. Maryland*, 373 U.S. 83, was delayed. The Court of Appeals held that because of the fact that this evidence was delayed and not suppressed, the judgment should not be reversed. It found that the material was not promptly turned over to counsel for appellants. It found, curiously, however, that appellants had several possible remedies, of which they "chose" not to avail themselves, such as requesting a continuance, recalling the witness for further examination, or introducing rebuttal evidence.

Furthermore, the Court below stated that there was no showing that the delay resulted in any prejudice, or even that the

evidence was material to the issue of guilt.

We maintain that this is casuistic reasoning since it must be assumed that such prosecutorial misconduct is prejudicial because it puts the defense at the distinct disadvantage of not being prepared for trial and ill-prepared to examine witnesses. A continuance or recalling a witness for further examination are unrealistic remedies. The only effective means of discouraging such improper conduct, which even the Court below found to be improper, is to suppress the evidence and to grant a new trial. (See *Lee v. Florida*, 392 U.S. 378).

At the time that the defendant-petitioner herein was arrested, he was offered the opportunity to make a telephone call. This was the only telephone call he'd be permitted to make following his arrest, and he naturally assumed it was confidential. Among other things which he stated to the person he had called was to call a Mr. "T" (who the jury obviously assumed to be co-defendant Tamer Mourad) and "call him my way".

This was perhaps the most incriminating piece of evidence against the petitioner because there were no electronic surveillance tapes of Hargrave and no searches and seizures affecting him personally, nor were any drugs ever found in his possession. Thus, this particular conversation transcended any other evidence against Hargrave and was the most virulent produced by the prosecution.

Additionally, Nassif Berro, who had already decided to cooperate with the government, was a fellow inmate of Hargrave's after he was arrested. He engaged Hargrave in a conversation at the Metropolitan Correction Center, and later testified against Hargrave, repeating certain matters that he was told. We believe that this was highly prejudicial and violated Hargrave's rights under *Massiah v. United States*, 377 U.S. 201.

During the trial, the witness Yaghi, who testified for the government, disappeared before his cross-examination was concluded. While it is true that there was substantial examination

of this witness, certain material which the government was required to turn over was turned over late, and consequently there was not an adequate opportunity to examine Yaghi on the basis of all the information which was ultimately obtained from the government. This, we maintain, prejudiced petitioner.

Finally, Hargrave, who was a first offender, was sentenced to 45 years imprisonment and a $120,000.00 fine, which was the sternest sentence meted out to any of the defendants. Under the circumstances, we maintain this violated his rights under the Eighth Amendment of the United States Constitution, as being cruel and unusual punishment.

This was even more severe than the sentence of Mourad who was convicted of a continuing criminal enterprise (21 U.S.C. §848).

POINT I

PETITIONER HARGRAVE WAS SEVERELY PREJUDICED WHEN THE TRIAL COURT, OVER OBJECTION, PERMITTED AGENTS TO TESTIFY ABOUT A CONVERSATION THEY OVERHEARD BETWEEN HARGRAVE AND SOMEONE ON THE TELEPHONE, AFTER HE HAD BEEN ARRESTED. THE CONVERSATION WAS PRECIPITATED BY THE OFFER MADE BY THE POLICE TO HARGRAVE, UPON HIS ARREST, THAT HE HAD THE OPPORTUNITY TO MAKE ONE PHONE CALL. THEY EAVESDROPPED UPON THIS PHONE CALL, HOWEVER, AND USED THE EVIDENCE AGAINST HIM. SINCE THIS WAS AFTER THE INSTITUTION OF JUDICIAL PROCEEDINGS AGAINST HIM, IT VIOLATED NOT ONLY HIS RIGHT AGAINST SELF-INCRIMINATION, BUT HIS RIGHT TO COUNSEL.

When Hargrave was arrested, the prosecution and the police already knew that he was represented by counsel. He was taken into custody and was offered an opportunity to make one telephone call. He made this telephone call to his wife and, among other things, said, in essence, to call "Mr. T", and "call him my way".

The prosecution argued that Mr. "T" referred to co-defendant Tamer Trad Mourad.

Since there was no evidence against Hargrave other than that of the accomplices, coupled with the fact that no physical evidence was ever found in Hargrave's possession, we maintain that this conversation was extremely prejudicial.

The agents positioned themselves, either deliberately or negligently, in a position where they could overhear what the defendant-petitioner was saying on the telephone.

A conversation which takes place when a prisoner is offered an opportunity to make "a" phone call should be deemed confidential and should not be made the subject of a "statement" to be used against him. At no time did the agents interrupt him to say they could hear what he was saying. Nor did Hargrave believe that he could be overheard.

This, we maintain, is a violation of the letter and spirit of *Massiah v. United States*, 377 U.S. 201.

In addition, in *McCubbin v. State*, 675 P.2d 461, the Oklahoma Supreme Court held that it was improper to place a private detective disguised as an inmate in a defendant's cell in the hopes of overhearing incriminating statements.

We maintain this should not have been admitted at trial.

In *Weatherford v. Bursey*, 429 U.S. 545, 51 L.Ed.2d 30, this Court held that no counsel deprivation or violation occurred and it was not reversible error because of the fact that an undercover agent overheard a conversation, because the conversation itself was never admitted into evidence.

We maintain that the ploy of utilizing these detectives to overhear what Hargrave was saying was tantamount to interrogation (*Brewer v. Williams*, 430 U.S. 387) and cannot be justified under a theory of "accidental overhearing". (See *Hoffa v. United States*, 385 U.S. 293; *Olmstead v. United States*, 277 U.S. 438, 72 L.Ed. 944; and, *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576).

See, *United States v. Gouneia*, _____U.S._____ #83-128, 5/29/84, where this Court recognized a right of counsel once

adversary judicial proceedings have commenced!

A case very close to that herein involved eavesdropping by police on a conversation with an accused's attorney. The Connecticut court reversed holding eavesdropping by police is violative of *Miranda* rights and makes a mockery of *Miranda* warnings. *State v. Ferrell*, 463 A.2d 573 (Conn.1983)

It must be borne in mind that *Massiah* bars any government efforts to elicit information from an individual, regardless of whether these efforts constitute "interrogation" within the meaning of *Miranda*, and under no circumstances can there be assumed to have been a "waiver" by Hargrave of his rights.

A *Massiah* violation will typically cast no doubt on the trustworthiness of the defendant's statements. But the *Massiah* "exclusionary rule" is not merely prophylactic; it is not designed to reduce the *risk* of actual Constitutional violations and is not intended to deter any pretrial behavior whatsoever. (See Kamisar, etc., "Modern Criminal Procedure"-1982 Ed., Ch. 8).

The failure to exclude evidence cannot be considered collateral to some more fundamental violation. Instead it is the admission at trial that it, in itself, denies the Constitutional right. When the government has made an "end run" around counsel, or effected pretrial discovery in disregard of the norms of legitimate adversary procedure, it is wholly beside the point to claim that the evidence obtained by such tactics was reliable. Use of the evidence taints the judicial proceeding in a fundamental way, and the relief required is either to suppress the evidence at trial or, if admitted, to reverse the conviction.

In *United States v. Henry*, 447 U.S. 264, 65 L.Ed.2d 115, this Court reversed a conviction because of improper governmental tactics in deliberately eliciting incriminating statements from Henry, within the meaning of *Massiah*. See too, *Brewer v. Williams*, 430 U.S. 387, 51 L.Ed.2d 424.

It should be noted that the agents did not inform the defendant-petitioner of the fact thay they were able to overhear what he was saying. Nor did they position themselves in such a place that they could not overhear it.

We submit that the recent case of *Solem v. Stumes*, _____U.S._____, No. 81-2149, decided 2/29/84, is not apposite here. *Stumes* held that *Edwards v. Arizona*, 451 U.S. 477 was not to be applied retroactively. But that case involved the thrust of *Miranda v. Arizona*, 384 U.S. 436, and did not involve an interpretation of *Massiah v. United States*.

The defendant-petitioner in this case had been formally arrested and thus, there is no question but that judicial proceedings had been instituted against him.

POINT II

THE PETITIONER WAS SEVERELY PREJUDICED BY VIRTUE OF THE FACT THAT A CONVERSATION BETWEEN HIMSELF AND NASSIF BERRO, WHILE BOTH WERE IN PRISON, AND WHILE BERRO, UNBEKNOWN TO PETITIONER, WAS COOPERATING WITH THE GOVERNMENT, WAS INTRODUCED AGAINST HIM.

The prosecution utilized the testimony of Nassif Berro, who had already agreed to cooperate with them at a point in time when he engaged the petitioner in a conversation while both were in jail. The contents of this conversation was introduced into evidence over objection and we maintain that it violated Hargrave's rights substantially. In essence, there was a "spy" utilized by the government. This violated *Hoffa v. United States*, supra, as well as *Massiah v. United States*, supra.

POINT III

WE INCORPORATE BY REFERENCE THE ARGUMENTS MADE IN THE COURT BELOW AND WE ADOPT THE BRIEF OF CO-APPELLANT, CO-PETITIONER, TAMER TRAD MOURAD.

POINT IV

THE SENTENCE IMPOSED UPON PETITIONER, NAMELY 45 YEARS PLUS $120,000.00 FINE, CONSIDERING HE WAS A FIRST OFFENDER, IS SO EGREGIOUSLY SEVERE AS TO CONSTITUTE A VIOLATION OF TH EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Eighth Amendment of the United States Constitution recognizes that cruel and unusual punishment has constitutional impacts.

While the charges against the petitioner herein were serious, it should be noted that the evidence against him was very, very thin. No physical evidence whatsoever was found against him. In addition, only the accomplices offered evidence of his involvement in drugs and, furthermore, serious errors were made concerning his involvement in the case.

There is no question but that the defendant must be considered a first offender. Yet, he received a more severe sentence than any other defendant in the case.

We maintain that this smacks of cruel and unusual punishment, and we ask this Court to rule that it violates the Eighth Amendment and that a remand for resentencing before another Judge is warranted and appropriate.

See, *Solem v. Helm*, _____U.S._____, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983):

> "The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. 103 S.Ct., at 3006."

Over 70 years ago, the United States Supreme Court recognized the principle of proportionality when it decided the case of *Weems v. United States*, 217 U.S. 349, 377(1910). The Court noted

> "That it is a precept of justice that punishment for crime should be graduated and proportional to the offense. 217 U.S., at 367."

The U.S.S.C. applied the principle, once again, in *Robinson v. California*, 370 U.S. 660 (1962) when it invalidated a 90-day sentence as being excessive for the crime of being "addicted to the use of narcotics". See, too: *United States v. Levine*, 288 F.2d 272 (2d Cir. 1961), *United States v. Dazzo*, 672 F.2d 284 (2d Cir. 1982) cert denied 103 S.Ct.81.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner,
Joseph Hargrave

APPENDICES

Supreme Court of the United States

No. A-1018

JOSEPH HARGRAVE,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s), IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1984.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 18th day of June, 1984.

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York on the 18th day of April one thousand nine hundred and eighty-four.

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH HARGRAVE, ADNAN YACTEENN, TAMER TRAD MOURAD,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by counsel for the defendant-appellant, Joseph Hargrave,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 445, 446, 447—August Term 1983

(Argued December 6, 1983 Decided February 24, 1984)

Docket Nos. 83-1194, 83-1197 and 83-1198

UNITED STATES OF AMERICA,

Appellee,

—v.—

TAMER TRAD MOURAD, JOSEPH HARGRAVE, and ADNAN YACTEEN,

Defendants-Appellants.

Before:

TIMBERS, VAN GRAAFEILAND and NEWMAN,
Circuit Judges.

Appeals from judgments entered in the Southern District of New York, Thomas P. Griesa, *District Judge*, after

jury trial, convicting all appellants of violations of the federal narcotics laws and related offenses, and convicting one appellant of organizing a continuing criminal enterprise.

All convictions affirmed; case of one appellant remanded solely for purpose of reconsideration of his sentence.

CARL M. BORNSTEIN, New York, N.Y. (Jacob Laufer, and Bornstein & Laufer, New York, N.Y., on the brief), *for appellant Mourad.*

IRVING ANOLIK, New York, N.Y., *for appellant Hargrave.*

WILLIAM P. O'NEILL, Springfield, Mass. (Matroni, Dimauro, Fitzgerald & Sweeney, Springfield, Mass., on the brief), *for appellant Yacteen.*

PAUL SCHECTMAN, Assistant United States Attorney, New York, N.Y., (Rudolph W. Giuliani, United States Attorney, Janette P. Patterson, Andrew J. Lavender, and Barry A. Bohrer, Assistant United States Attorneys, New York, N.Y., on the brief), *for appellee.*

TIMBERS, *Circuit Judge*:

Appellants Mourad, Hargrave and Yacteen appeal from judgments entered May 18, 1983 in the Southern District of New York, Thomas P. Griesa, *District Judge*, after an eight week jury trial, convicting them of violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the Act), and related offenses.

Specifically, appellants were convicted of the following offenses: all appellants of conspiring to import heroin, 21 U.S.C. § 963 (1982), and conspiring to distribute heroin, 21 U.S.C. § 846 (1982); appellant Mourad of organizing a continuing criminal enterprise, 21 U.S.C. § 848 (1982); all appellants of various substantive violations of the narcotics laws for importing and distributing heroin, 21 U.S.C. §§ 812, 841(a)(1), 841 (b)(1)(A), 952, 960 (1982); appellants Mourad and Yacteen of interstate travel to facilitate the distribution of heroin, 18 U.S.C. § 1952 (1982); and all appellants of using interstate facilities to promote the distribution of heroin, 18 U.S.C. § 1952 (1982).

For the reasons stated below, we affirm the convictions of all appellants on all counts; and we remand the case of Mourad to the district court solely for the purpose of reconsideration of his sentence in accordance with our opinion herein.

I.

FACTS AND PRIOR PROCEEDINGS

During the course of the eight week trial a great deal of evidence was adduced which resulted from a five month investigation by the Drug Enforcement Administration (DEA). We shall summarize only so much of the evidence

as we believe necessary to an understanding of our rulings on the legal issues raised on appeal. There was evidence from which the jury could have found as follows.

The evidence included the testimony of four accomplice witnesses, evidence of physical surveillances, evidence of the fruit of various searches, and proof of unexplained wealth. Such evidence permitted the jury to find that appellants were high ranking figures in an international narcotics smuggling operation that transported a continuous flow of large quantities of heroin from Lebanon to the United States over a four year period.

Mourad, a Lebanese national, directed the movement of heroin into the United States from Lebanon. Yacteen, who was Mourad's chief assistant, helped transport and safeguard the enterprise's heroin. Hargrave supervised the distribution network in the New York area.

The smuggling operation began in 1979 when Mourad and Hargrave travelled to Lebanon to meet with a heroin refiner. On that trip they were introduced to a former Lebanese customs official, Mohamed Berro, who agreed to help them covertly transport heroin to the United States. Berro agreed with Mourad and Hargrave that a dummy corporation should be set up, with offices in New York City and Beirut, to act as a cover for the frequent traveling which would be necessary. Nassif Berro, the son of this former customs official, was one of the government's chief witnesses at trial. He was present at the initial negotiations and later picked up the first shipment of heroin for delivery to his father, who arranged for shipment to Mourad and Hargrave in New York. An airline pilot acted as courier and delivered the heroin to Mourad.

Several weeks after delivery of the first shipment, a second purchase of heroin was made from the same

refiner. Again, Berro, Sr. arranged to have a courier deliver the heroin to a relative of Mourad in Los Angeles. Berro, Sr. was paid about $90,000 for his help.

Hargrave and Mourad again travelled to Lebanon in the spring of 1980. They contacted Mourad's longtime friend, Mahmoud Yaghi, who later testified for the government. He arranged for a villa for Hargrave, Mourad and their friends. He also introduced Hargrave and Mourad to a Lebanese banker, to whom Hargrave gave $200,000 while Yaghi watched. Yaghi introduced them to a new heroin supplier, Hargrave having expressed dissatisfaction with the quality of the heroin supplied earlier. Hargrave and Mourad engaged Yaghi to transport some of the new heroin to New York. While in New York, Yaghi witnessed two heroin transactions involving Hargrave and Mourad.

In April 1981, Mourad and Yacteen travelled to Lebanon. Again Yaghi was engaged to arrange for delivery of a new shipment of heroin. He and another courier delivered it personally. Both Yaghi and the courier later were arrested in New York by DEA agents.

In October 1981, another shipment was intercepted when another Lebanese courier was arrested while claiming his luggage in New York. This courier, Emil Ghazali, also later testified for the government.

Additional shipments from Lebanon to the United States took place in February, March and June of 1982. Berro's son was arrested in New York City while attempting to sell the June delivery to an undercover agent. Two days later, Hargrave was arrested on an indictment returned in the District of New Jersey for income tax evasion. At the time of his arrest he placed a telephone call to his wife in the presence of government agents. During this telephone conversation, he made incriminat-

ing statements in code. Later, while imprisoned in the same facility as Berro, Hargrave made a number of incriminating statements to Berro.

On November 7, 1982, DEA agents executed search warrants at the homes of Mourad and Yacteen in Agawam and East Long Meadow, Massachusetts. The search of Mourad's home resulted in the seizure of a pound of unrefined heroin; quantities and traces of mannitol, a heroin dilutant; glassine envelopes; hashish and marijuana; $26,000 in cash; and a narcotics ledger written in Arabic. The search of Yacteen's home resulted in the seizure of a false-bottomed suitcase containing traces of heroin; a triple beam scale; mini-scales; a heat sealer; glassine bags; hollow-point bullets; a .357 Magnum handgun; $10,000 in cash; and financial records concerning Yacteen's narcotics trafficking. The agents also seized the telephone books of Mourad and Yacteen which contained the telephone numbers of their co-conspirators.

Mourad and Yacteen subsequently were arrested and confined at the Franklin House of Detention in Massachusetts. There they made a number of incriminating statements to a fellow prisoner who later testified for the government.

On January 4, 1983, appellants Mourad, Hargrave and Yacteen were indicted, in the instant case, along with Jamil Hameiah, Ghassan Saleh, Nawal Yacteen and Nemr Hazime. Trial began on February 7, 1983 and was concluded on April 4, 1983. Mourad, Yacteen, and Hargrave were convicted of various charges set forth in the margin.[1] Saleh, Hazime, and Nawal Yacteen were acquit-

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[1] Mourad was convicted of unlawfully, wilfully and knowingly importing, distributing and possessing with intent to distribute narcotics and conspiring to do the same, engaging in a continuing criminal enterprise, and travelling interstate and using interstate telephone

ted. Hameiah remains a fugitive. On May 18, 1983, the court sentenced Mourad to a total of 45 years imprisonment and a $100,000 fine; Hargrave to a total of 45 years imprisonment and a $120,000 fine;[2] and Yacteen to 15 years imprisonment as a young adult offender pursuant to 18 U.S.C. § 4216 (1982). From their judgments of conviction, appellants have taken the instant appeals.

Of the various claims of error raised on appeal, we rule as follows on what we find to be the essential ones: (1) appellants were not denied a fair trial by alleged prosecutorial misconduct; (2) disappearance of a witness did not prejudice appellants; (3) the court's evidentiary rulings which are challenged were correct, and (4) since the narcotics conspiracy conviction of appellant Mourad merged with his continuing criminal enterprise conviction, his case is remanded solely for the purpose of reconsideration of his sentence.

We shall discuss seriatim our rulings stated above.

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communications to carry out narcotics traffic as charged in counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), 846, 848, 952, 960, 963 and 18 U.S.C. §§ 2, 1952 (1982).

Yacteen was convicted of unlawfully, wilfully and knowingly importing, distributing and possessing with intent to distribute narcotics and conspiring to do the same, and travelling interstate and using interstate telephone communications to do so as charged in counts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), 846, 952, 960, 963 and 18 U.S.C. §§ 2, 1952 (1982).

Hargrave was convicted of unlawfully, wilfully and knowingly importing, distributing and possessing with intent to distribute narcotics, conspiring to do the same, and using interstate telephone communications to do so as charged in counts 1, 2, 4, 5 and 15 in violation of 21 U.S.C. §§ 846, 963 (1982) and 18 U.S.C. §§ 2, 1952.

[2] Hargrave's sentence also covered income tax charges filed against him in the District of New Jersey, to which he pleaded guilty before Judge Griesa pursuant to Fed. R. Crim. P. 20.

II.

ALLEGED PROSECUTORIAL MISCONDUCT

Appellants contend that their convictions should be reversed because of alleged prosecutorial misconduct. Their chief argument is that the defense was placed at a disadvantage because production of material required by 18 U.S.C. § 3500 (1982) (the Jencks Act), Fed. R. Crim. P. 16, and *Brady* v. *Maryland*, 373 U.S. 83 (1963), was delayed. Appellants claim that they therefore were unable to use such material effectively.

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

It is true that some material was not promptly turned over to counsel for appellants.[3] We believe, however, that there are at least two reasons why such prosecutorial conduct does not warrant reversal. First, production of the evidence was delayed, not suppressed.[4] Appellants had several possible remedies at various times of which they chose not to avail themselves, such as requesting a continuance, recalling the witness for further examination, or introducing rebuttal evidence. Second, there had been no showing that the delay resulted in any prejudice,

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3 For example, the government failed to turn over telephone books seized from Ghazali, one of the heroin couriers, until the night before he testified. Also, the prosecutor gave defense counsel a copy of a business card bearing the name and telephone number of an unindicted co-conspirator only one day before it was offered in evidence.

4 *E.g.*, 18 U.S.C. § 3500 requires that the government produce relevant statements only *after* the witness has completed his direct examination.

or even that the evidence was material to the issue of guilt. The trial judge carefully scrutinized the possibility of prosecutorial misconduct and discovery abuse. Indeed, he struck the testimony of one witness when the government inadvertently failed to produce one of the witness's reports. In *United States* v. *Sperling*, ____ F.2d ____, slip op. 1193 (2 Cir. Jan. 20, 1984), we recently considered a case where a tape which contained impeaching evidence was not produced by the government until after the trial. We affirmed the conviction because there was no likelihood that the lack of evidence reasonably could have affected the verdict. ____ F.2d at ____, slip op. at 1201. A similar conclusion is inescapable in the instant case where appellants have failed to show any prejudice whatsoever.

We hold that appellants' claim of alleged prosecutorial misconduct is without merit.[5]

III.

DISAPPEARANCE OF A WITNESS

Yaghi was called as a witness by the government on February 22, 1983. Cross-examination began that afternoon. By the end of February 23, counsel for appellants had completed their cross-examination of him.

On the morning of February 24, the government belatedly produced the minutes of Yaghi's sentencing hearing

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[5] Appellants assert various other claims of prosecutorial misconduct which clearly are without merit. The fact that a grand jury indictment is based solely on hearsay evidence does not automatically require its dismissal. *Costello* v. *United States*, 350 U.S. 359 (1956). Similarly, the court properly overruled defense counsel's objection to a handwriting expert's testimony. The prosecutor informed defense counsel the previous day of the likelihood of such testimony, but did not produce the report at that time because it was not completed until that night. The expert had not been engaged until well into the trial.

which disclosed that he had lied to the sentencing judge. To eliminate the possibility of prejudice, the court postponed further cross-examination until that afternoon to allow defense counsel to examine this important impeachment evidence. Counsel for one of the defendants not involved on this appeal fully cross-examined Yaghi on the sentencing minutes, as well as on Yaghi's conversation with a defense investigator in which Yaghi supposedly confessed to having falsely implicated the defendant. By the end of February 24, each of appellants' counsel, except counsel for Mourad, had had an opportunity to re-open his cross-examination of Yaghi concerning the sentencing minutes.

On February 25, Yaghi failed to return for completion of his testimony. The court, noting that virtually all cross-examination had been completed, indicated that it would not grant any motion for a mistrial, nor would it strike Yaghi's testimony. On March 10, the government stated that it still had not been able to locate Yaghi. The court thereupon permitted defense counsel to introduce, in the presence of the jury, evidence of Yaghi's flight. A substantial portion of the defense case was devoted to that issue and to other attacks on Yaghi's credibility.

Under these circumstances, appellants' claims—pressed especially by Hargrave—that they were denied a complete right to confrontation of the witness Yaghi are without merit. As for Hargrave, prior to Yaghi's disappearance Hargrave had completed his cross-examination; he had been permitted to re-open his cross-examination; and he had stated expressly that he had no further questions to ask.

During cross-examination of Yaghi, defense counsel had elicited that he had committed a revenge murder in Lebanon and that that murder had occurred in a court-

room; that he had lied to DEA agents at the time of his arrest; that his defense at his own trial was a sham; that he had lied to a grand jury in New Jersey; and that he had written letters to Hargrave and Mourad in which he solicited substantial sums of money and threatened otherwise to be "on the side of the government".

In this context, we find reasonable the court's finding that it was the government that had been chiefly prejudiced by Yaghi's disappearance, since the government had been denied the opportunity to rehabilitate its witness. Moreover, the evidence of Yaghi's flight had been fully disclosed to the jury, enabling them to draw their own conclusions.

Mourad's argument with respect to Yaghi focuses upon his claim that he was denied the right to question a defense investigator about Yaghi's statement to the investigator that Yaghi was being pressured by the government agents to testify and that he would tell them anything unless one or more of the defendants paid him money. Mourad contends that the investigator's testimony was relevant to Yaghi's bias. The court excluded the testimony on the ground that it was extrinsic evidence of bias which was inadmissible because Yaghi was not available to explain or deny the statements attributed to him as required by Fed. R. Evid. 613(b). We believe that the court's ruling in this respect was not prejudicial to appellants in view of similar evidence already before the jury, e.g., Yaghi's letters to Mourad and Hargrave demanding money and threatening to testify for the government if he did not receive the money.

We hold that appellants were not prejudiced by the disappearance of the witness Yaghi and that the court's rulings with respect thereto, including the exclusion of the testimony of the investigator, were not erroneous.

IV.

EVIDENTIARY RULINGS

(A)

The search of Yacteen's home resulted in the seizure of a .357 Magnum handgun which was admitted in evidence against all appellants.

Hargrave contends that its admission against him constitutes reversible error. Physical evidence found in the home of one conspirator is admissible against all conspirators to show the existence of the conspiracy. *United States* v. *Praetorius*, 622 F.2d 1054, 1063 (2 Cir. 1979), *cert. denied*, 449 U.S. 860 (1980). Guns constitute important evidence of a narcotics conspiracy. "[S]ubstantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment." *United States* v. *Wiener*, 534 F.2d 15, 18 (2 Cir.), *cert. denied*, 429 U.S. 820 (1976). The admission of Yacteen's gun was significant evidence probative of the scope of the conspiracy as to all appellants.

Hargrave challenges the admission against him of three small bags of hashish found in Mourad's home. While it is not clear from the record whether this evidence was relevant to the heroin conspiracy, its admission could hardly have resulted in significant prejudice. In the context of the evidence of kilograms of high-purity heroin, it is unlikely that this small quantity of hashish found in Mourad's home could have prejudiced Hargrave.

(B)

Hargrave contends that the court improperly admitted the testimony of two DEA agents regarding incriminating

statements he made in their presence during a telephone call to his wife at the time of his arrest.[6] We find no merit in Hargrave's claim that this evidence violated his Sixth Amendment rights.[7]

The relevant inquiry with respect to this type of claim under the Sixth Amendment is "whether the Government has interfered with the right to counsel of the accused by 'deliberately eliciting' incriminating statements." *United States* v. *Henry*, 447 U.S. 264, 272 (1980). The record before us does not show any such deliberate attempt to elicit evidence. The agents merely told Hargrave that he could use the telephone. They did not suggest that he call any particular person nor did they propose topics of conversation. And there is no indication that offering Hargrave the telephone was a ploy "designed to elicit an incriminating response". *United States* v. *Guido*, 704 F.2d 675, 677 (2 Cir. 1983), quoting *Rhode Island* v. *Innis*, 446 U.S. 291, 302 n.7 (1980). We find that the statements made by Hargrave during the telephone conversation were not illegally obtained by the agents and that they were properly admitted in evidence.

We hold that no error was committed by the court in the challenged evidentiary rulings.

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6 Hargrave called his wife following his indictment for income tax violations and told her to "only call 'Mr. T,' call it my way." Other evidence established that the "Mr. T." referred to was appellant Tamer Trad Mourad. The two agents were in the same room. They stood approximately four and six feet from Hargrave during the telephone conversation. Hargrave's careful choice of words indicates that he knew that the agents were listening and that his conversation was not confidential.

7 Hargarve's claim that the agents violated his Fourth Amendment rights was raised in the district court and therefore is not properly before us. *United States* v. *Fuentes*, 563 F.2d 527, 531 (2 Cir.), *cert. denied*, 434 U.S. 959 (1977).

V.

MERGER OF CONSPIRACY AND CONTINUING CRIMINAL ENTERPRISE CONVICTIONS

Mourad contends that the sentences imposed on him for all Title 21 convictions except his § 848 conviction, see note 15, *infra*, violate the double jeopardy clause of the Fifth Amendment by subjecting him to punishment for lesser included offenses which merged with the continuing criminal enterprise conviction under § 848.[8] We hold that Congress did not intend to authorize cumulative punishment for conspiracy and continuing criminal enterprise convictions under the Act. We therefore vacate the sentences imposed on Mourad on the conspiracy counts and remand his case solely for the purpose of reconsideration of his § 848 sentence.

The Supreme Court in *Jeffers* v. *United States*, 432 U.S. 137 (1977) (plurality opinion), first dealt with the problem presented by convictions for conspiracy and a continuing criminal enterprise in violation of § 848.[9] *Jef-*

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[8] Since the law does not permit conviction for a lesser included offense if proof of the greater offense necessarily involves proof of the lesser, *Blockburger* v. *United States*, 284 U.S. 299 (1932); *Gavieres* v. *United States*, 220 U.S. 338 (1911), a conviction and sentence imposed for a lesser included offense must be vacated when there has been a conviction for the greater offense. *United States* v. *Rosenthal*, 454 F.2d 1252, 1255 (2 Cir.), *cert. denied*, 406 U.S. 931 (1972).

[9] *Jeffers* arose in a different context than *Whalen* v. *United States*, 445 U.S. 684 (1980), or the instant case. The grand jury returned two indictments against Jeffers, one charging violation of § 846 and the other charging violation of § 848. The conspiracy indictment charged the same predicate offenses and involved the same time period as the continuing criminal enterprise indictment. The defendant opposed consolidation on the grounds that the parties charged in the two indictments differed and much of the § 846 evidence would be inadmissible on the § 848 charge. The court denied the motion to consolidate.

(*footnote continued*)

fers has been the subject of a number of differing interpretations.[10] We read the actual holding narrowly: a defendant found guilty of both a conspiracy and a continuing criminal enterprise may not be fined more than the maximum authorized by § 848. *United States* v. *Gomberg*, 715 F.2d 843, 849 (3 Cir. 1983). The Supreme Court expressly declined to settle "definitively" the issue as to whether § 846 was a lesser included offense of § 848.[11] Rather, the Court relied upon an assumption that arguendo § 848 required agreement between co-conspirators. 432 U.S. at 149, 153 n.20, 155.

Instead of finding § 846 to be a lesser included offense of § 848, as we have previously held, *United States* v. *Sperling*, 560 F.2d 1050, 1060 (2 Cir. 1977), the Court in *Jeffers* relied on a multiple punishment analysis[12] and an

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The defendant first was tried on the § 846 indictment and was found guilty. A motion to dismiss the § 848 indictment on the ground of double jeopardy was denied. After trial of the § 848 indictment, the defendant was found guilty; he was sentenced to life imprisonment and the maximum fine was imposed.

The Supreme Court held that the defendant had waived his double jeopardy claim by opposing consolidation of the trials. 432 U.S. at 152. This conclusion was challenged by [illegible]

10 *E.g.*, *United States* v. *Smith*, 690 F.2d 748, 750 (9 Cir. 1982), *cert. denied*, ___ U.S. ___ (1983); *United States* v. *Chagra*, 669 F.2d 241, 261-62 (5 Cir.), *cert. denied*, ___ U.S. ___ (1982); *United States* v. *Chagra*, 653 F.2d 26, 32-34 (1 Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *United States* v. *Barnes*, 604 F.2d 121, 155-56 (2 Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); *United States* v. *Valenzuela*, 596 F.2d 1361, 1364-65 (9 Cir.), *cert. denied*, 444 U.S. 867 (1979).

11 Justice Blackmun's lengthy defense of the reasonableness of such an interpretation, however, makes it clear that the Court did not wholly disregard that issue.

12 In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court held that the Fifth Amendment guarantee against double jeopardy prohibits three separate actions: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.

examination of Congressional intent. The Fifth Amendment protects against multiple punishments for the same offense. *North Carolina* v. *Pearce, supra* note 12, 395 U.S. at 717; *Whalen* v. *United States, supra* note 9, 445 U.S. at 689. Considering the double jeopardy implications of multiple punishments imposed in a single criminal proceeding, the Court in *Whalen* held that the federal courts were precluded from imposing consecutive sentences unless authorized by Congress. Statutory construction thus serves as the basis for resolving a multiple punishment double jeopardy claim. *Missouri* v. *Hunter*, ____ U.S. ____ (1983); *Albernaz* v. *United States*, 450 U.S. 333 (1981); *United States* v. *Marrale*, 695 F.2d 658, 662 (2 Cir. 1982), *cert. denied*, ____ U.S. ____ (1983).

Although the Court in *Jeffers* concluded that Congress did not sanction cumulative punishment for violations of § 846 and § 848, there is some ambiguity about the extent of its holding with respect to Congressional intent concerning other substantive and conspiracy offenses included in the Act.[13] Some language seems to support an interpretation that *all* offenses merge with a § 848 conviction.[14] For example, the Court's conclusion that § 848 "reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of penalties from *other sections* of the Comprehensive Drug Abuse Prevention and Control Act of 1970", 432 U.S. at 156 (emphasis added), seems to indicate that all other provisions of the Act, substantive as well as conspiratorial, merge within the inclusive ambit of § 848.

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13 We reject the government's contention that *Jeffers* meant only to address § 846. There is no logical reason to single out § 846 conspiracies from others under the Act.

14 This interpretation is followed by the Fifth Circuit, *United States* v. *Chagra*, *supra* note 10, 669 F.2d at 261-62, and the Third Circuit, *United States* v. *Gomberg*, *supra*, 715 F.2d at 851.

Our reading of Justice Blackmun's plurality opinion in *Jeffers* leads us to conclude that only cumulative punishment for conspiracy violations is prohibited, and that cumulative punishment for substantive offenses and a continuing criminal enterprise under § 848 does not violate the double jeopardy clause. Justice Blackmun explicitly recognized the propriety of charging substantive crimes and conspiracies separately, but held that there were no equally valid policy reasons for charging conspiracies and continuing criminal enterprises separately. 432 U.S. at 157. Absent explicit language to the contrary, we adhere to the well established view that conspiracy statutes do not foreclose punishment for substantive offenses. We see no reason to assume that § 848 is intended to cover substantive violations.

This conclusion is consistent with our approach in *United States* v. *Barnes*, 604 F.2d 121, 155-56 (2 Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). There we upheld the district court's decision not to impose sentence on the conspiracy count since the maximum statutory penalty had been imposed on the continuing criminal enterprise count; but we affirmed the sentences imposed for the various underlying substantive offenses.

We vacate the sentences imposed on Mourad on the conspiracy counts (Counts 1 and 2, 21 U.S.C. §§ 846 and 963)[15] and we remand his case to the district court with

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15 Mourad was sentenced as follows:

Group	*Count*	*Statute*	*Sentence*
A	3	21 U.S.C. § 848	40 years + $50,000
B	2	21 U.S.C. § 963	15 years + $25,000
B	4	21 U.S.C. §§ 952, 960 18 U.S.C. § 2	10 years + $25,000*
B	7	21 U.S.C. §§ 952, 960 18 U.S.C. § 2	10 years*

(*Footnote continued*)

directions to reconsider the sentence imposed under § 848, keeping in mind that the district court may consider whether to increase the § 848 sentence. *See McClain* v. *United States*, 643 F.2d 911 (2 Cir. 1981) (Van Graafeiland, J.). The lifetime special parole provisions imposed under Counts 4, 5, 7, 10, 11 and 12 are not to be disturbed. *See United States* v. *Chagra*, 669 F.2d 241, 261-62, 266 (5 Cir.), *cert. denied*, ____ U.S. ____ (1982).

Group	*Count*	*Statute*	*Sentence*
B	10	21 U.S.C. §§ 952, 960 18 U.S.C. § 2	10 years*
C	1	21 U.S.C. § 846	15 years
C	5	21 U.S.C. § 846 18 U.S.C. § 2	10 years*
C	8	21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) 18 U.S.C. § 2	10 years*
C	11	21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) 18 U.S.C. § 2	5 years*
C	12	21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) 18 U.S.C. § 2	5 years*
D	6	18 U.S.C. §§ 1952, 2	5 years
D	9	18 U.S.C. §§ 1952, 2	5 years
D	13	18 U.S.C. §§ 1952, 2	5 years
D	15	18 U.S.C. §§ 1952, 2	5 years

*Plus lifetime special parole

The prison sentences in Group B are to be served consecutively for a total of 45 years. The prison sentences in Group C are to be served consecutively for a total of 45 years. The prison sentences in Group D are to be served consecutively for a total of 20 years.

The 40-year sentence in Group A, the total 45-year sentence in Group B, the total 45-year sentence in Group C, and the total 20-year sentence in Group D are to be served concurrently.

We have carefully considered all other claims of error raised by appellants and we find them to be without any merit whatsoever.

Appellants were convicted after a fair trial of serious offenses committed beginning five years ago. We order that the mandate issue forthwith.

All convictions are affirmed; the case of appellant Mourad is remanded solely for the purpose of reconsideration of his sentence in accordance with this opinion.

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

February 24, 1984
83-1194, 83-1197, 83-1198

RE:
USA vs. Mourad, Yacteenn, Hargrave

*Judgment affirmed. Appellant Mourad remanded solely for purpose of reconsideration of his sentence.

Dear Sirs:

The Court has today handed down a decision in the above entitled cause *see above the decision of the district court.

A copy of the opinion will be mailed to you

Additional copies of opinions may be obtained from this office in accordance with §0.17(7) of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) F.R.A.P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,

A. Daniel Fusaro
Clerk

BY: Genevieve Hopstock
Deputy Clerk